UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

KERN, INYO AND MONO COUNTIES BUILDING AND
CONSTRUCTION TRADES COUNCIL[1]

and Case 31–CE–129697

GOLDEN QUEEN MINING CO., LLC.[2]

Simone Gancayco, Esq., John Rubin, Esq.,
for the General Counsel.

Ray Van Der Nat, Esq., for the Respondent.

Richard N. Hill, Esq. and Jason Shapiro, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, between June 24 and 26, 2015, upon the complaint in Case 31–CE–129697 issued on October 28, 2014, by the Regional Director for Region 31.

The complaint alleges that Building Trades Council, Kern, Inyo and Mono Counties (Respondent) violated Section (8)(e) of the Act by entering into and reaffirming an agreement in which the Employer has agreed not to do business with another employer or person.

Respondent filed a timely answer to the complaint and stated it had committed no wrongdoing.

Findings of Fact

Upon the entire record, including the briefs from the counsel for the General Counsel, Charging Party, and Respondent, I make the following findings of fact.

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[1] At the hearing the name of Respondent was corrected to Kern, Inyo and Mono Counties Building and Construction Trades Council.

[2] At the hearing the name of Charging Party was corrected to Golden Queen Mining, LLC.

I. Jurisdiction

In its answer, Respondent denied the commerce allegations in complaint paragraphs 1 through 3. However, at the hearing evidence was adduced that established that Golden Queen Mining, LLC (Employer) has been a corporation with an office and place of business in Mojave, California, and has been engaged in the development and operation of a gold and silver mine on Soledad Mountain in Kern County, California. The record reflects that during the 12-month period ending June 3, 2014, the Employer in conducting its business described above purchased and received at its Mojave, California facility goods and/or services valued in excess of $50,000 directly from points outside the State of California. At all material times, the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

Respondent stipulated[3] that it is a labor organization within the meaning of Section 2(5) of the Act in which employees participate and which exists for the purpose of dealing with employers concerning wages, hours, and other terms and conditions of employment. The parties also stipulated that John Spaulding (Spaulding) has held the position of executive secretary and has been an agent of Respondent within the meaning of Section 2(13) of the Act because he possesses and exercises the authority to represent Respondent in labor relations matters involving the Employer and that Ray Van der Nat (Van der Nat) has held the position of attorney and has been an agent of Respondent within the meaning of Section 2(13) of the Act because he possessed and exercised the authority to represent Respondent in matters with the Employer in 2014. I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

The parties stipulated[4] that they entered a Project Labor Agreement (PLA) on about August 20, 1997, and that on or about May 13, 2014, Respondent requested to arbitrate a grievance filed pursuant to the PLA, as alleged in complaint paragraphs 6(a) and (b). The main issue for resolution is whether the Employer has been engaged as a construction industry employer within the meaning of Section 8(e) of the Act and therefore whether the PLA falls within the first proviso to Section 8(e).

B. History of the Mining Operation at Soledad Mountain

The Employer, Golden Queen Mining Company, LLC, is presently developing the Soledad Mountain Project (Soledad Project). The Soledad Project is an open pit mine and heap leach process designed to extract and recover gold and silver. The Soledad Project is located approximately 90 miles north of Los Angeles and near Mojave, California.

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[3] GC Exh.2.

[4] Ibid.[used in citations.]

1. The initial phase of the mine development

The Employer began developing the Soledad Project in about 1996 under the direction of Richard Graeme (Graeme), the Employer's vice president of operations. Commencing in 1996, Graeme's job was to determine if there was a viable mineral deposit at Soledad Mountain, i.e., gold or silver, through sampling and core drilling, identify the process by which the ore was to be recovered, engage in pre-engineering to develop the design of the mine, obtain permits for the Soledad Project from the various Federal, State and local regulatory agencies, conduct further engineering to further define the mineral deposit and finally commence construction.

From 1996 to about 1999, the Employer had from seven to12 employees including contract geologists who engaged in sample collection and core logging to determine the quality and amount of mineral, a human resources manager and other office clericals, in addition to a mine engineer who engaged in ore reserve modeling and mine processing. Graeme estimated that in order to construct the Soledad Project, the employer would have needed between 300 and 400 employees.

Prior to 1999, no construction on the mine or its facilities took place. According to Graeme the Employer planned to enter into an Engineering Procurement and Construction Management (EPCM) agreement for constructing the mine.

Graeme, who had 55 years of experience in the mining industry, explained an EPCM agreement is a mining industry practice for mine construction. Graeme said that since the Employer had no expertise in mine construction, it planned to use an EPCM contractor. According to Graeme, under an EPCM contract, the mine operator turns over responsibility for construction to the third party EPCM contractor that is responsible for completing final engineering documents, procuring all necessary construction materials and equipment, and construction management. The EPCM contractor employs all subcontractors and manages them.

In March 1998 M3 Engineering of Tucson, Arizona, issued a feasibility report[5] for the Employer. The report corroborates Graeme's testimony and shows that the Employer planned to utilize an EPCM contractor for the Soledad Project construction.

Figure 2.1 of the above report indicates that the Employer would use an EPCM contractor for all facets of construction, including subcontracts for general site-work, concrete, structural steel, mechanical, piping, plate-work, dust collection, electrical, instrumentation, and ancillary buildings.

Section 2.2.3 of the report defines the role of the EPCM contractor:

> EPCM contractor will be an independent contractor operating under an agreement entered into with GQMC. This agreement will identify the deliverables (work products) required, and the reporting and approval requirements, and will set minimum standards for work quality and performance. Dates for completion of various parts of the services, the responsibilities of GQMC and commercial aspects will also be part of this agreement.

[5] GC Exh.9.

By 1996, the Employer had conducted testing of noise, air, and water and had purchased property. In seeking to obtain the necessary permits, Graeme met with regulatory authorities from Kern County, including the Water board and the Air Board. Graeme was also engaged in a PR campaign with Mojave area residents to gain their approval of the mine to avoid local opposition that might hinder the permitting process.

Respondent and other local unions sought a Project Labor Agreement (PLA) for the mine project in about 1997. On August 20, 1997, the parties signed the PLA.[6] The PLA provides in pertinent part:

> 1. INITIAL PROVISIONS
>
> 1.5 Primary Employer represents and warrants that is an employer in the building and construction industry because, at the commencement of construction and as of the date of executing this Agreement, it directly employs persons in the building and construction trades, will employ such persons on the Project, and will continue to do so until completion of the commissioning of the Project. (GC Ex. 3 at 3).
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> 2. PURPOSE
>
> 2.1. A large labor pool represented by the Unions will be required to execute the work involved in the Project. Employers wish, and it is the purpose of this Agreement, to ensure that a sufficient supply of skilled craft workers are available at the Project, that all construction work and related work performed by the members of the Unions on this Project shall proceed continuously, without interruption, in a safe and efficient manner, economically with due consideration for the protection of labor standards, wages and working conditions.
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> 2.2. In furtherance of these purposes and to secure Optimum productivity, harmonious relations between the parties and the orderly performance of the work, the parties to this Agreement agree to establish adequate and fair wage levels and working conditions and to protect the Project against strikes and lockouts and other interference with the process of the work.
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> 5. SUBCONTRACTING
>
> 5.1 The Primary Employer agrees that any contractor or subcontractor at any tier performing Covered Work on the Project shall be (i) signatory to this Agreement, and (ii) signatory to a multi-employer collective bargaining agreement with one or more of the Unions for the Soledad Mountain Project.
>
> 5.2 Nothing in this Agreement shall in any manner whatsoever limit the rights of the Primary Employer, or any other Employer, to subcontract work or to select its contractors or subcontractors, provided, however, that all Employers, contractors, or subcontractors, at all tiers, performing Covered Work

[6] GC Exh.3.

> shall be required to comply with the provisions of this Agreement. Employer shall notify each of its contractors and subcontractors of the provisions of this Agreement and require as a condition precedent to the award of any construction contractor or subcontract for Covered Work, that all such contractors and subcontractors at all tiers become signatory to this Agreement. Employers shall become signatory to this Agreement by signing an Employer Agreement to be Bound, which is provided as Attachment A to this Agreement.

Graeme initially received a copy of the PLA[7] from the Employer's attorney, Jim Good (Good), on about July 8, 1997. On July 9, 1997, Good sent a faxed version of the proposed PLA with the additional proposed language, "The Unions have reviewed the environmental documents proposed by the County of Kern and the Bureau of land management for the Project, and agree that they will not oppose or otherwise interfere with the permitting and construction of the Project."[8] On July 10, 1997, Good sent another proposed version of the PLA which contained language that read, "The Unions recognize the importance of this Project for the local economy of eastern Kern County and support this Project for the permanent jobs it will provide."[9]

Graeme testified credibly that he signed the PLA because he was afraid that the local unions could oppose the project that the employer had already invested millions of dollars in. Graeme's testimony in this regard is corroborated by contemporaneous written reports. I credit Graeme.

A June 10, 1997 monthly report[10] to the Employer's directors from Employer President Steve Banning reflects Graeme's fears that the unions could raise environmental objections to the Soledad Project in the permitting process:

> A union has spent considerable money dissecting the Draft EIS/EIR and has proposed to us that they will support the project if we agree to have union labor construct the project. Negotiations are underway, and it appears that the situation will be resolved without impacting the permitting schedule.

The report explains further the Employer's efforts to negotiate an agreement with the local unions:

> It was brought to our attention that an unusual amount of research into our Draft EIS/EIR was being conducted by a law firm in Bakersfield. Upon our inquiry, it was discovered that they were representing a building and construction crafts union, and that the union is interested in providing their support (which means not impeding the process) in exchange for our agreement to use union labor to construct the project. With the assistance of local legal counsel, we are currently negotiating an agreement with this union to allow their involvement during the construction phase of the project only.

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[7] GC Exh.4.

[8] GC Exh.5.

[9] GC Exh.6.

[10] GC Exh.7.

An August 6, 1997 memorandum[11] from Banning to Graeme states:

> Several meetings were held with representatives of the Kern, Inyo and Mono counties Building and Construction Trades Council. The intent on the part of the unions was to force GQMC to enter into an agreement whereby all initial construction would be union. The leverage used by this group was the threat of substantially delaying the permits through challenging the air model and other aspects of the EIR/EIS. An agreement was signed after it was confirmed through several independent sources including the Kern County Air Board that this was a very real threat to the project permitting. The next decision is how to handle an agreement signed under duress.

According to Graeme, whose testimony I credit, at the time he signed the PLA, he was unaware of any conflict in the Mojave area between union and nonunion employees and that during negotiations for the PLA, the parties never discussed entering into the PLA to avoid jobsite friction between union and nonunion employees. Graeme testified that he never told the unions involved that the Employer would act as its own general contractor and that it wanted to choose subcontractors on the project, that it would supervise the day-to-day onsite construction work, and that it wanted to directly hire employees in the building and construction trades.

Graeme admitted that while he signed the PLA under duress he felt he had obligated the Employer to the terms of the PLA.

While Respondent in its brief suggests that Graeme admitted that the Employer employed construction employees at the Soledad Project,[12] Graeme immediately clarified that any employees would be employed by the independent EPCM contractor.[13]

Graeme admitted that he did not remember attending any of the negotiations for the PLA, being involved in the PLA negotiations, when the PLA negotiations took place, where they took place, who attended, or what was discussed.

Mitch Rolow was the business manager of the International Brotherhood of Electrical Workers Local 428 located in Kern County, California, from 1992 thru May 1998. He testified that during that time period, there was a general decline in the amount of construction work being performed on a union basis and that most of the construction jobs were a mix of union and nonunion contractors. He claimed there was always someone picketing at constructions sites. When another union picketed on a job where union electricians were employed, Rolow testified that it disrupted the flow of everything on the job.

Rolow was involved in the negotiations for the PLA for the Soledad Project. According to Rolow, the Employer discussed its desire of hiring electricians directly on the Employer's payroll and Local 428 helping the Employer in getting its permits from the local regulatory agencies. The parties discussed that each subcontractor performing project work would have to be signatory to the craft unions master labor agreements.

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[11] GC Exh.8.

[12] Tr. at 83, LL. 15–20.

[13] Tr. at 83, LL. 21–25.

I found Rolow's testimony concerning the negotiations for the PLA and the Employer's requests for assistance with the permitting process vague and lacking in the specificity necessary to credit his testimony. Given Graeme's credible testimony that the Employer at all times intended to hire an EPCM general contractor and the documentary evidence in the form of M3 Engineering's feasibility report that the Employer intended to hire an EPCM general contractor, I find Rolow's 18-year-old testimony incredibly convenient and tailored to Respondent's position.

Ray Simmons was the business representative and financial secretary of Carpenters Local 743, which covered the Kern, Inyo and Mono county area, from 1976 to July 2013. According to Simmons, during the 1995–1997 timeframe, 50 to 60 percent of the construction projects in the area were performed on a nonunion basis. During the same timeframe, Simmons spent 20 percent of his time in picketing activities. All of the other building trades unions were similarly engaged in picketing activities. When carpenter members honored the picket line of other construction unions, some of the contractors for who those members worked would be removed from the job.

Simmons was involved in the negotiations that resulted in the PLA for the Soledad Project. According to Simmons, at the first negotiating meeting between the parties, the Employer presented the intended project, stated that they wanted help in the permitting process for the job and that they wanted a qualified work force to draw from. Simmons testified that the Employer stated that they were going to self- perform project work and would be hiring, directly, members of the various trades to perform that work.

In view of the Employer's documented plans to use an EPCM contractor for the Soledad Project as well as its lack of in-house expertise in construction, I find it hard to believe that representatives of the Employer told Simmons that they would act as their own general contractor and directly hire members of the trade unions. Moreover, Simmons' recollection of the PLA meetings and representations by the Employer that it would be its own contractor must be called into question since Simmons claims that Klingmann was at the 1997 PLA negotiations. This cannot be correct as Klingmann was not involved in the Soledad Project until 2001.

In an October 2013 lunch meeting, Respondent's executive secretary, John Spaulding (Spaulding), claimed that the Employer's counsel, Katy Raytis (Raytis), told him that Klingmann acted as the Employer's construction manager. In view of Spaulding's earlier testimony that he believed the Employer hired no employees for the Soledad Project but used only general contractors and subcontractors and given Klingmann's total lack of expertise in construction, I cannot credit Spaulding's testimony that Raytis would have represented Klingmann to be the Employer's construction manager.

2. The 1999–2012 hiatus and reopening of the project

While the Employer was able to obtain the necessary permits for the mine, construction never took place and the Soledad Project was ultimately shut down in 1999 because of unfavorable gold prices.

Lutz Klingmann (Klingmann), who was president of Golden Queen, Limited, took over and reopened the Soledad Project in 2001. Klingmann was also the chief executive officer of Golden Queen LLC beginning in September 2014. In addition, he served as a director of Golden Queen Mining Company, Limited, from 1989 until 1996, during which time he had little involvement with the mine. Due to new permit requirements, it took the Employer from 2001 until 2012 to obtain the required permits for the mine. From October 2012 until the middle of

2013, the Employer sought financing for the mine project and in July 2013 began mine development.

Klingmann decided that instead of using an EPCM contractor, the Employer would use turnkey project contracts. Klingmann, after identifying and performing the specifications for each component piece of the mine, then negotiated with one or two contractors for each mine component as a turnkey project, i.e., fully completed by the contractor. The parties executed the turnkey project contract, and a notice to proceed was issued by the Employer. The contractors proceed with all aspects of the actual construction, and the Employer had only a coordination role in the process.

The various turnkey projects included the workshop warehouse, assay laboratory, the earthworks required for building facilities, a project for stacking and conveying, electrical work, crushing screening plant, and the Merrill-Crowe plant, which extracts the actual gold and silver. Gary Little Construction is the turnkey contractor for the workshop warehouse, assay laboratory, and Merill-Crowe plant.[14] Guinn Corporation[15] is the contractor for the earthworks. Terra Nova Technologies (TNT) is the turnkey contractor for the stacking and conveying work.[16] A-C Electric Company[17] is the contractor for electrical work. Turnkey Processing Solutions[18] (TPS) is the contractor for the crushing screening plant. Kappes Cassidy and Associates (KCA) has contracts for procurement of materials for the Merrill-Crowe plant.[19]

The uncontradicted and fully credited testimony of Klingmann was that each contractor was responsible for having its own manager employees, equipment, materials, and supplies that are needed for construction, that the Employer did not supervise any of the contractors' employees on the construction site, including setting work schedules or terms and conditions of employment. Moreover, Klingmann testified that the Employer has not chosen subcontractors of the above-turnkey contractors.

Klingmann's testimony is corroborated by the terms of the various turnkey contracts. Thus, the Gary Little Construction contract[20] provides at article 2.1 that Little is responsible for furnishing, "all labor, services, equipment, materials, tools, consumables, temporary facilities and temporary utilities necessary to construct and complete the project . . . ." Under article 5.6 supervision and labor, the construction contract states: "Contractor will at all times furnish adequate quantities of qualified supervision and labor to maintain the progress of the Work. Contractor will at all times have a qualified superintendent present at the Work site . . . . Contractor shall be exclusively responsible for the means and methods of constructing the Work." [21]

In addition Little's contract to build the assay laboratory provides at article 2.1 that Little must, "furnish all labor, services, equipment, materials, tools, consumables, temporary facilities

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[14] GC Exhs. 12, 13 and 27.

[15] GC Exh. 14.

[16] GC Exh.15.

[17] GC Exh.11.

[18] GC Exh.29.

[19] GC Exhs. 28-29.

[20] GC Exh.12.

[21] Ibid.

and temporary utilities necessary to construct and complete the [Assay Laboratory]."[22] The supervision and labor provision is the same as in Little's other contract above.[23]

The Little contract for construction of the Merrill-Crowe plant provides under "ARTICLE 2-SCOPE OF WORK" that Little must "furnish all labor, services, equipment, materials, tools, consumables, temporary facilities and temporary utilities necessary to construct and complete the project . . . ."[24] The construction contract also contains a supervision and labor provision under "ARTICLE 5-CONTRACTOR'S RESPONSIBILITIES" subparagraph 5.6 that states Little must "furnish adequate quantities of qualified supervision and labor to maintain the progress of the Work. Contractor will at all times have a qualified superintendent present at the Work site with authority to act on behalf and to bind Contractor. Contractor shall be exclusively responsible for the means and methods for constructing the Work."[25]

There are similar contract provisions for Little's construction of the fuel storage facility[26] and the guard shack and swing gate at the Soledad Project.[27]

Guinn Corporation's master service agreement for earthmoving provides at section D, paragraph 2.29 that the Employer "has no control over the manner, method, or details of [Guinn Corporation's] performance."[28] It further provides at paragraph 2.30 that Guinn Corporation must furnish, "all necessary personnel, equipment, materials, tools, supplies, expertise, and supervision reasonably necessary for the services."[29]

The TNT contract provides at article 2.1 that it must "furnish all professional design and engineering services, and all labor, services, equipment, materials, tools, consumables, temporary facilities and temporary utilities necessary to engineer, procure, construct and commission the Conveying and Stacking System . . . ."[30] Like the other turnkey contracts, this contract also contains a supervision and labor provision at article 5.7 which provides that TNT must, "furnish adequate quantities of qualified supervision and labor," must "at all times have a qualified superintendent present at the Work site," and that TNT is "exclusively responsible for the means and methods for constructing the Work."[31]

The master service agreement with A-C Electric at paragraph 2.29, states A-C Electric, "is [Employer's] independent contractor . . . . [Employer] shall designate the services it desires, but [A-C Electric] shall decide how such services shall be performed. [Employer] is interested only in the results obtained, and has no control over the manner, method, or details of [A-C

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22 GC Exh.13.
23 Ibid.
24 GC Exh.27.
25 Ibid.
26 R Exh.25.
27 R Exh.27.
28 GC Exh.14.
29 Ibid.
30 GC Exh.15.
31 Ibid.

Electric's] performance."[32] Further, at paragraph 2.30, the master services agreement states that A-C Electric must "furnish all necessary personnel, equipment, materials, tools, supplies, expertise, and supervision reasonable necessary for the services."[33]

The KCA supply contract, under "ARTICLE 2-SCOPE OF WORK" states that "[KCA] WILL . . . furnish all labor, services, equipment, [and] materials . . ."[34] necessary for the Merrill-Crowe plant.

The TPS contract to construct the crushing and screening plant, provides under ARTICLE 2-SCOPE OF WORK, provides that TPS must "furnish all labor, services, equipment, materials, tools, consumables, temporary facilities and temporary utilities necessary to engineer, procure, construct, commission and complete the [crushing-screening plant] . . . ."[35] The TPS contract also contains the standard "Supervision and Labor" provision under "ARTICLE 5-CONTRACTOR'S RESPONSIBILITIES" subparagraph 5.8. Furthermore, the contract provides at subparagraph 5.3, "Contractor's Status that TPS is an independent contractor . . . Nothing . . . shall be construed to create an employment relationship between [the Employer] and employee of [TPS] or [TPS's subcontractors and suppliers of any tier."[36]

As noted above, there is no credible evidence that the Employer told a union representative that it intended to contract with subcontractors on the Soledad Project. This is supported by evidence that turnkey contractors hired subcontractors for the Soledad Project without the Employer's approval.

For example, TPS hired separate subcontractors to perform electrical, installation, mechanical, and concrete work. Guinn Corporation hired one subcontractor for the heap leach facility, another subcontractor for the crushing and screening plant, three subcontractors for the pump box, another subcontractor for the water system, two subcontractors for the Hilfiker retaining wall, another subcontractor for the earth work for the asphalt installation, and another subcontractor for the electrical work in the parking lot. Gary Little Construction hired five separate subcontractors for the workshop warehouse's construction, four separate subcontractors for the Assay Laboratory, a subcontractor for the fuel storage area, another subcontractor for the guard shack, and 1- subcontractors for the Merrill-Crowe building. KCA hired three subcontractors and A-C Electric hired two subcontractors. There is no evidence that the Employer was involved in choosing any of the subcontractors performing construction work on site but the evidence shows it left the selection of subcontractors entirely to the turnkey contractors.

Under both the Guinn Corporation[37] and the A-C Electric master services agreements[38] no scope of work is described nor do those contracts give the contractors the exclusive right to perform any given scope of work. Paragraph 1.2 of the Guinn and A-C Electric master service agreements cited above, provide that "This Agreement does not obligate Company [Employer]

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[32] GC Exh.11.

[33] Ibid.

[34] GC Exh.28.

[35] GC Exh.29.

[36] Ibid.

[37] GC Exh.14.

[38] GC Exh.11.

to order services, materials or equipment nor does it obligate Contractor to accept services orders or any other orders."

The record reflects that under the Guinn master services agreement, the Employer issued approximately 20 “Notices to Proceed”[39], each for a separate and distinct scope of work, or portion of the Soledad Project, to be performed by Guinn. In its brief, Respondent cites Klingmann’s testimony concerning the Employer’s supervision of Guinn on the Project, "So Guinn was a really actively involved in the project under our direct control and management long before we actually decided to proceed with the project."[40] However, Klingmann immediately explained, “I do not supervise Guinn’s work. Totally independent management team on site.” [sic][41]

The Employer removed certain scopes of work that it had initially awarded to one contractor and then later gave it to a different contractor. Gary Little Construction was originally to provide a septic system under the turnkey contract for the workshop warehouse. This work was later given to Guinn Construction. [42]

While the evidence reflects that the Employer retained control of which work to award under the various contracts, both Klingmann’s testimony and the language of the turnkey contracts reflects that the Employer had no role in directing or supervising these contractors or their subcontractors.

As noted above, the record reflects that the Employer has no experience in construction. While the record fails to establish that the Employer supervises the activities of the general turnkey contractors at the mine project, it does reflect that it coordinates the activities of the contractors and ensures that the turnkey contracts proceed according to their terms.

3. The plant operations manager

Since about April 2014, the Employer has employed Joe Balas (Balas) as plant operations manager. Balas reports directly to Klingman. Balas’ duties include coordinating the activities of the turnkey contractors. Once the mine is completed, Balas will be in charge of operating the mine. While Balas has had 26 years of experience in the mining and processing business, he has had no experience in construction work. The record reflects that Balas does not interact with the subcontractors on the Project. Although the Employer may become aware of issues that may arise between a contractor and one the contractor’s subcontractors, the decision as to how to proceed with the issue rests solely with the contractor. Thus, one of Guinn’s subcontractors got its excavator tangled in overhead power lines. Guinn terminated its contract with this subcontractor. The Employer had no involvement in the decision to terminate. A TPS subcontractor was not following the TPS contract and TPS terminated its contract with the subcontractor. While the record reflects that Balas had conversations with TPS about the incident Balas made no recommendation to TPS about terminating the sub.

Balas’ and Klingmann’s testimony about Balas connection with the contractors and subcontractors on the jobsite is consistent with the job description for plant operations

[39] R Exhs.12–16, 18–21, 23, 24, 26, and 28.

[40] Tr. at 300, LL. 8–10.

[41] Tr. at 301, LL. 5–6.

[42] R. Exh. 18.

manager.[43] The preamble in the job description notes that "The Manager—Plant Operations will coordinate construction starting with the workshop-warehouse which is now under way." In the job description under "Responsibilities" the only mention of construction is, "Oversee the final design, coordinate with contractors during construction. . . ."[44] At page 2 of the job description under "Requirements" experience in mining is required, no experience in construction is set forth.

While Klingmann testified that Employer never purchased equipment or materials for the Project, he later admitted the Employer purchased e-houses, medium voltage transformer, service entrance panel, and revenue metering unit, rain shields at e-houses, a water well pump station, a meter switch board for the water supply infrastructure, a motor control center, an electrical house for PW-1, as well as the high pressure grinding roll for the crushing and screening plant.

The Employer currently employs about 23 employees[45] including an assay laboratory technician and supervisor, a plant operations supervisor, a plant operations manager, mining equipment operators and supervisors, mechanics, and a surveyor. By the end of 2015, the Employer plans to hire approximately 100 employees, 72 of whom will be employed in mining. None of these employees perform construction work on the Project. Only plant operations supervisor William Andrews and surveyor Brent Wilkins have any regular interactions with the contractors on the jobsite. Andrews' establishes the progress of the various components of the project while Wilkins insures that the locations of various project building is correct.

4. The reaffirmation of the PLA

By letter dated August 29, 2013[46], Respondent's executive secretary, John Spaulding, advised Klingmann that the Employer had signed a PLA covering the project requiring all contractors and subcontractors to be signatory to the PLA. By letter, dated September 17, 2013,[47] Spaulding told Klingmann that it appeared that contractors or subcontractors working on the project had not signed the PLA. By letter, dated September 20, 2013,[48] Klingmann advised Spaulding that the PLA had lapsed.

From the fall of 2013 to early 2014, the parties engaged in settlement negotiations that ultimately bore no fruit.

On March 20, 2014, Respondent rejected the employer's February 19, 2014 settlement offer proposal and stated it wished to proceed to step 2 of the grievance procedure regarding the PLA or alternatively to proceed to arbitration. [49] .

[43] GC Exh. 25.
[44] Ibid.
[45] GC Exh.24.
[46] GC Exh.16.
[47] GC Exh.17.
[48] GC Exh.18.
[49] GC Exh.21.

After the Employer rejected a further settlement proposal by Respondent, on May 13, 2014, it notified the Employer that it wished to proceed to arbitration under article 8, section 8.3 step 3(a) of the PLA.[50]

C. The Analysis

1. The 8(e) proviso

Section 8(e) of the Act provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person . . . Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work . . . .

There is no dispute that the subcontracting provisions of the PLA (sections. 5.1 and 5.2) herein fall within the prohibition of Section 8(e) of the Act as they require the Employer to cease doing business with any person not signatory to the PLA or to a multi-employer collective bargaining agreement with one or more of the Unions. *Carpenters Local 944 (Woelke & Romero Framing, Inc.),* 239 NLRB 241 (1978). Thus, the initial inquiry in this case is to determine if the PLA falls within the proviso to Section 8(e) because the Employer is an employer in the construction industry. Respondent has the burden of proving the subcontracting language in the PLA is protected under construction industry proviso in Section 8(e) set forth above. *Carpenters Local 623 (Atlantic Exposition Services),* 335 NLRB 586, 586 (2001).

2. The Employer's status as a construction industry employer

The Law

In *Carpenters Local 743 (Longs Drug),* 278 NLRB 440, 442 (1986), held that whether an employer is an employer in the construction industry within the meaning of the first proviso of Section 8(e) of the Act, depends on the facts of each case. The burden is on the party asserting the defense to prove the employer's construction industry status. *Carpenters Chicago Council (Polk Bros.),* 275 NLRB 294, 296 (1985).

In *Glen Falls Building & Construction Council* (Indeck Energy), 325 NLRB 1084, 1087 (1998), the Board noted that the resolution of the term construction industry employer within the meaning of the first 8(e) proviso ‘‘is dependent on the degree of control over the construction-site labor relations."

In *Los Angeles Building & Construction Trades Council (Church's Fried Chicken),* 183 NLRB 1037 (1970), the Board found that an employer engaged primarily in the retail food business was engaged in the construction industry because it acted as its own general

[50] GC Exh.23.

contractor in the construction of its own retail stores and thereby necessarily retained control over its subcontractor's labor relations.

However, in *Columbus Building & Construction Trades Council (Kroger Co.),* 149 NLRB 1224 (1964), the Board concluded that while Kroger, a retail food store, completed some work on store site built by a general contractor that Kroger was an operator of a chain of retail stores and was not, under the circumstances of the case, an employer engaged in the construction industry.

In *Church's Fried Chicken,* supra at 1037, the Board noted that where an employer hires a general contractor but regularly makes decisions, including the selection of subcontractors, the employer retains such control and is tantamount to being the general contractor.

In *Longs Drug,* supra at 442, the Board held that where an employer does not act as its own general contractor, it will be held to be an employer in the construction industry under the 8(e) proviso if it retains control of the labor relations at the project, including such factors as choosing or supervising the subcontractors at the site. However, the Board also noted that an employer's visits to the jobsite to insure work was being performed in compliance with the plans and specifications of a contract would not bring an employer within the meaning of the first proviso to Section 8(e) of the Act. *Longs,* supra *at* 442. *Carpenters (Rowley-Schlimgen),* 318 NLRB 714, 716 (1995), was an example of where an employer who did not directly employ carpet installers at a jobsite was found to be a construction industry employer because it retained sufficient control over the subcontractor through its own employee who supervised the subcontractor's employees.

3. Discussion

The testimony in this case from both Graeme and Klingmann is undisputed that the Employer from 1996 to the present never intended to nor in fact acted as a general contractor. Contrary to the statement in section 1.5 of the PLA that the Employer represented that was an employer in the building and construction and would persons in the building and constructions trades in Project, the evidence reflects that at the outset of the Soledad Project, the Employer intended to hire an EPCM general contractor to construct the mine. The plan to use an EPCM contractor, called for in the March 1998 M3 Engineering feasibility report, was never implemented due to economic issues. When the project was reinstated in 2001 by Klingmann it is clear that the Employer changed from using one general contractor to using a series of turnkey contractors for discreet portions of building the mine. There is not a scintilla of evidence that the Employer retained control over the labor relations of the turnkey contractors or their subcontractors by supervising them, selecting the subs or directing their work in any way. Klingmann's testimony in this regard is consistent with the language in the form contracts of each of the turnkey contractors which specify that the contractors are responsible for all labor, services, equipment and will at all times furnish adequate quantities of qualified supervision and labor to maintain the progress of the work.

Respondent cites examples of notices to proceed from the Employer to various turnkey contractors to suggest that it is a construction-industry employer. The notices to proceed give the contractors permission to go forward with work and do not evidence the Employer's control of the manner or means of the contractor's performance or control over jobsite labor relations.

Respondent also argues that Balas, the Employer's manager of plant operations, was responsible for the coordination of the construction of the turnkey project and his involvement

was tantamount to being a general contractor as in *Rowley-Schlimgen* and *Church's Fried Chicken,* supra. Balas duties are limited to coordinating the activities of the turnkey contractors. On a day-to-day basis, Balas checks with the various contractors' project managers about the rate of progress on construction or budget issues. However, these are very short conversations, lasting just a few minutes on average. He has no contact with subcontractors. Although Balas may become aware of issues that between a contractor and the contractor's subcontractors, any decision as to how the work should be performed rests solely with the contractor. Balas holds once a week safety meetings with the turnkey contractors and learns what the contractors will be working on that wee. While Balas has 26 years of experience in the mining business, he has no experience in construction work. He is an unlikely choice for a general construction contractor. None of this evidence suggests that the Employer, through Balas, acts as its own general contractor as in *Rowley-Schlimgen or Church's Fried Chicken, supra.* Balas' duties are similar to the employer's visits to the jobsite to insure work was being performed in compliance with the plans and specifications of a contract in *Longs supra at 442* where the Board found the employer's visits were not tantamount to functioning as a general contractor.

Respondent next argues that since the Employer purchased materials and equipment including e-houses, medium voltage transformers, service entrance panels, revenue metering units, rain shields at e-houses, a water well pump station, a meter switch board for the water supply infrastructure, a motor control center, an electrical house for PW-1 as well as the high pressure grinding roll for the crushing and screening plant for its contractors to install and use in the construction of its Project it is a construction employer within the meaning of Section 8(e) of the Act.

That the Employer purchased materials and equipment to be installed on its project, does not establish that it in any way controlled the manner or means of performance of the contractors and subcontractors or supervised them in a manner that reflects it controlled the labor relations on its project.

4. The 10(b) defense

In its answer Respondent contends that the allegations of the complaint are barred by the statute of limitations. Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

A contract that falls afoul of Section 8(e) of the Act must be entered into within the 10(b) period to violate the Act. Where the original contract is beyond the 10(b) period, later reaffirmation of the agreement, including seeking contract enforcement through the grievance and arbitration procedure, is considered as entering into for the purposes of Section 8(e*). Teamsters Local 277 (J & J Farms Creamery*), 335 NLRB 1031, 1031(2001); *Carpenters (Novinger's, Inc.),* 337 NLRB 1030, 2030 (2002); *Carpenters Local 1149*, 221 NLRB 456, 456 fn. 2 (1975); *Dan McKinney Co.,* 137 NLRB 649, 653–657 (1962).

The charge was filed on May 30, 2014 and a copy served on Respondent on that date. While the PLA herein was entered into outside the 10(b) period in 1997, the parties have stipulated that Respondent reaffirmed the PLA on about May 13, 2014, when it requested arbitration of a grievance alleging that the Employer had failed to comply with provisions of the PLA. I find that the PLA was reaffirmed by Respondent on or about May 13, 2014, and thus I find no merit to Respondent's 10(b) defense.

5. Estoppel defense

Respondent takes the position that the Employer should be estopped from denying that it did not hire employees to perform project work and that it is therefore a construction industry employer for 8(e) purposes. Respondent argues and cites in support of its estoppel argument a line of Board cases including *Alpha Associates (Unite),* 344 NLRB 782 (2005), *R.P.C., Inc.,* 311 NLRB 232 (1993), *Red Coats*, 328 NLRB 205, 206 (1999), and *Verizon Information Services (CWA),* 335 NLRB 558 (2001). In this narrow line of cases involving withdrawal of recognition based upon a Union merger issue two years prior, the untimely challenge of a voluntary recognition, and an RC petition filed contrary to a Union's agreement, the Board held that in these narrow circumstances estoppel may apply. The facts of those cases are inapposite here.

However in *Longs,* supra at 442–443, a case on all fours with the instant case, the Board held:

> Nevertheless, the Respondents assert that the Employer, having entered into an agreement that it would hire only union contractors, should not be permitted to absolve itself of this contractual duty, and should be estopped from contesting its status as an employer in the construction industry; and that this is particularly as the Respondents, in reliance on the Employer's contractual commitments over the years, have furnished carpenters, on request, through their various hiring halls. I similarly find this argument of Respondents to be without merit, particularly as there is no showing that the current or prior contracts were entered into with the mutual understanding that the Employer would act as its own general contractor or would hire only union general contractors.

Here, like in *Longs*, supra, there is insufficient evidence to establish that the PLA was entered into by the parties with the mutual understanding that the Employer would act as its own general contractor or hire only union contractors. While this may have been the intent of Respondent, the evidence reflects that at all times the Employer planned to hire either an ECPM contractor or turnkey contractors. The record further shows that it was the Employer's fear of the local unions disrupting the mine permitting process that motivated the Employer's signature of the PLA. Thus the element of mutuality is missing from this case. Since Respondent has failed to establish that there was a mutual understanding between it and the Employer that the Employer would act as its own general contractor, Respondent's estoppel defense is rejected.

Similarly Respondent's reliance on *Orange Belt District Council of Painters No. 48, (Maloney Specialties, Inc.),* 276 NLRB 1372 (1985), is misplaced. The facts and holding in *Maloney* are unlike the circumstances herein. In *Maloney,* neither the definition of a construction industry employer nor estoppel was implicated.

Based on the above, I find that the Employer is not now and since at least 1996 has not been a construction industry employer within the meaning of the first proviso to Section 8(e) of the Act. Having so found, the PLA is not protected by the first proviso to Section 8(e) of the Act and violates the Act as alleged in the complaint.

Having so found, it is not necessary to reach the additional nonstatutory requirements for proviso agreements, that the PLA was negotiated in the context of a collective-bargaining relationship or the common-situs issues suggested by *dicta* in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) but not passed on by the Board.

CONCLUSIONS OF LAW

1. Golden Queen Mining, LLC. is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(e) of the Act by entering into and enforcing an agreement requiring Golden Queen Mining, LLC. to hire only union contractors or union subcontractors for its construction projects, and by applying those contractual provisions to a construction site where Golden Queen Mining, LLC is not an employer in the construction industry within the meaning of the first proviso to Section 8(e) of the Act.

4. The aforesaid unfair labor practice affects commerce as defined in Section 2 of the Act.

THE REMEDY

Having found that the Respondents violated the Act, I recommend they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[51]

ORDER

The Respondent, Kern, Inyo and Mono Counties Building and Construction Trades Council, Bakersfield, California, its officers, agents, and representatives, shall

1. Cease and desist from entering into, maintaining, giving effect to or enforcing those provisions of our August 20, 1997 PLA with Golden Queen Mining LLC to the extent found unlawful.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Seek dismissal of the May 13, 2014 request for arbitration under article 8, section 8.3, Step 3(a) of the PLA.

(b) Within 14 days after service by the Region, post at their offices, meeting halls, and locations where notices to their members are customarily posted, copies of the attached notice marked “Appendix."[52] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by authorized representatives

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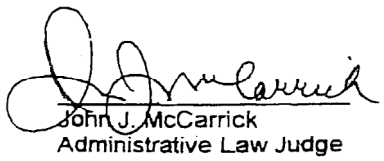
[51] If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[52] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be posted by the Respondent immediately after receipt and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to ensure those notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director in a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken.

Dated, Washington, D.C. December 7, 2015



John J. McCarrick
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT enter into, reaffirm, maintain, or give effect to our August 20, 1997 PLA with Golden Queen Mining LLC.

WE WILL seek dismissal of our May 13, 2014, request for arbitration under Article 8, section 8.3 Step 3(a) of the PLA.

Kern, Inyo and Mono Counties Building and Construction Trades Council
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700
Los Angeles, California 90064-1824
Hours: 8:30 a.m. to 5 p.m.
310-235-7352

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CE-129697 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7123.